SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-971

D. C. TRANSIT SYSTEM, INC., *Petitioner*

v.

DEMOCRATIC CENTRAL COMMITTEE OF THE DISTRICT OF COLUMBIA,
BLACK UNITED FRONT,
WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the opinions and judgments of the United States Court of Appeals for the District of Columbia Circuit, rendered on June 28, 1973, in *Democratic Central Committee of the District of Columbia, et al.* v. *Washington Metropolitan Area Transit Commission,* No. 21,865 (D.C. Cir., June 28, 1973), *Democratic Central Committee of the District of Columbia, et al.* v. *Washington Metropolitan Area Tran-*

sit Commission, No. 24,398 (D.C. Cir., June 28, 1973), and *Black United Front* v. *Washington Metropolitan Area Transit Commission,* No. 24,428 (D.C. Cir., June 28, 1973). Petitioner was an Intervenor in those cases.

OPINIONS BELOW

The opinions of the Court of Appeals, which are not yet reported, are printed as Appendices A and B to this Petition. The Court of Appeals' denial of Intervenor's Petition for Rehearing and Suggestion for Rehearing En Banc is not reported but is printed as Appendix C to this Petition.

JURISDICTION

The opinions of the United States Court of Appeals for the District of Columbia Circuit were rendered on June 28, 1973. Intervenor's Petition for Rehearing and Suggestion for Rehearing En Banc was timely filed on August 27, 1973, and denied by the Court of Appeals on September 24, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does denying to the owners of a utility's land the growth in value of that land deprive them of property without due process of law, or constitute a "taking" of property for public use without just compensation in violation of the Fifth Amendment to the United States Constitution?

2. When a court retroactively reverses a utility commission's consistently applied treatment of land appreciation, recalculates the utility's income for all prior years based upon the court's new rule, and applies the recalculated income to the future, does the court violate

the utility's guarantees of procedural due process in violation of the Fifth Amendment to the United States Constitution?

3. By overturning the long-established accounting practice of a regulatory commission, which practice is universally accepted in public utility regulation and consistent with all legal precedent, has the United States Court of Appeals for the District of Columbia Circuit exceeded the legitimate scope of its reviewing authority?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor [shall any person] be deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

These cases arose as appeals to the United States Court of Appeals for the District of Columbia Circuit of two orders—one issued in 1968 and one in 1970—by the Washington Metropolitan Area Transit Commission (hereinafter, the Commission). On these appeals, a three-judge panel of the Court of Appeals, with one judge dissenting, held, *inter alia,* that the Commission's long-standing and universally accepted practice of recognizing that growth in the value of a utility's land belongs to its investors was "irrational" (App. 71a). The panel majority held that capital gains on land belong, not to a utility's investors, but to its ratepayers. Therefore, according to the court, a public utility's rates should be decreased —dollar for dollar—by the amount of appreciation in

its land once it is sold or simply transferred to non-operating status. Moreover, the court applied a new principle of retroactivity to utilities, recalculating the income of the utility for all prior years on the basis of the new rule on capital gains and applying the difference as future income.

In 1956, Petitioner D. C. Transit System, Inc. (hereinafter, Transit) was awarded a franchise to operate a mass transportation system within the Washington metropolitan area, and soon thereafter Transit acquired the assets of the existing transit system.[1] The parcels of land upon which this litigation centers were a part of that 1956 acquisition.[2]

From time to time between 1956 and 1968 (the date of the first Commission order here involved), various parcels of land employed by Transit in its mass transit operations lost their usefulness for those purposes. In accordance with procedures consistently prescribed by the Commission and its predecessor,[3] Transit accounted for this loss of usefulness by transferring the parcels on its books from operating to non-operating

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[1] Pub. L. No. 84-757, 70 Stat. 598 (1956).

[2] The Court of Appeals' opinions and judgments cover both depreciable properties (*i.e.*, buildings) and non-depreciable properties (*i.e.*, land). Although Transit disagrees strongly with the court's treatment of depreciable properties, it raises in this Petition only the court's treatment of land.

[3] The Washington Metropolitan Area Transit Commission was created in 1960 and succeeded the District of Columbia Public Utility Commission (hereinafter, PUC). *See* Washington Metropolitan Area Transit Regulation Compact (hereinafter, Compact), tit. I, art. II, incorporated into Pub. L. No. 86-794, 74 Stat. 1031 (1960), set forth following D.C. Code § 1-1410 (1973). The practice of both the PUC and the Commission regarding treatment of appreciation on land has been the same. *See* pp. 16-17, *infra*.

status (in accounting terms, transferring them "below the line"). If a parcel were subsequently sold, any gain was credited to the investors. During this period, the Commission issued numerous rate orders applying to Transit, in the process of which this practice was repeatedly approved, either explicitly [4] or implicitly. [5]

In late 1967, Transit applied for a rate increase which, after public hearings and a thorough review of Transit's operations, was partially granted by the Commission. [6] A petition for rehearing was denied by the Commission, [7] whereupon Appeal No. 21,865 was filed with the Court of Appeals for review of that 1968 Commission order.

In 1970, Transit applied for an additional fare increase. Upon review, the Commission granted the increase [8] and subsequently denied a petition for rehearing, [9] whereupon Appeal Nos. 24,398 and 24,428 were filed with the Court of Appeals for review of the 1970 Commission order.

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[4] *See* pp. 16-17, *infra*.

[5] The Commission is given broad powers to review and alter, on its own initiative, any practice of Transit which affects fares and which is unjust or unreasonable. Compact, tit. II, art. XII, § 6.

[6] *D. C. Transit System, Inc.* (Order No. 773), 72 P.U.R.3d 113 (WMATC 1968).

[7] *D. C. Transit System, Inc.* (Order No. 781) (WMATC Feb. 26, 1968) (unreported); *D. C. Transit System, Inc.* (Order No. 781a) 74 P.U.R.3d 178 (WMATC 1968).

[8] *D. C. Transit System, Inc.* (Order No. 1052) 85 P.U.R.3d 1 (WMATC 1970).

[9] *D. C. Transit System, Inc.* (Order No. 1057) 85 P.U.R.3d 33 (WMATC 1970).

The individual and organizational Respondents asserted below that the two Commission orders were invalid because, *inter alia,* the Commission had failed to recognize that income was "realized" when these parcels of land were transferred "below the line" and that this income—measured by the difference between the cost of the land to Transit and its fair market value when transferred—belonged to the farepayers. Accordingly, these Respondents claimed that the fares set by the Commission should have been decreased by that amount.

The panel majority of the Court of Appeals concurred with this view. It rejected what it acknowledged was the long-standing practice of the Commission,[10] and held that growth in the value of land while in service should be credited to farepayers and not to the 7000 shareholders of Transit's parent. It took the position that, although at one time investors may have had a constitutionally-protected interest in the growth in value of their property, more recent decisions of this Court indicate that they no longer have such protection (App. 27a).

The panel majority applied its new rule with retroactive effect. It held not only that farepayers were entitled to the appreciation on parcels that had been transferred while the two orders now deemed invalid were in effect, but that they were also entitled to the growth in value while in service of all the parcels of land that had been transferred to non-operating status since Transit commenced business in 1956.

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[10] The Court of Appeals stated that: "The decisions within the District—all administrative—have reached a uniform result * * *" (App. 17a). "[T]he administrative decisions * * * have uniformly viewed such gains as belonging to Transit's investors * * *" (App. 23a).

Since Transit's operations, subsequent to the two Commission orders under review, had been publicly assumed,[11] the panel majority ordered Transit to make total restitution to the farepayers and remanded to the Commission to determine the amount and method of that restitution.

Judge MacKinnon dissented from the majority's "wholly unprecedented" treatment of land, and warned of its "dangerous" implications (App. 121a, 95a). The majority, he said "blithely concludes without close analysis" that the principles which apply to *depreciable* assets also apply to *non-depreciable* assets, and it engages in a "procrustean attempt" to force the latter into the former's mold (App. 94a, 99a). Moreover, Judge MacKinnon took the position that administrative accounting, where consistently applied, "should not be the subject of *de novo* judicial examination," which, he said, "violates fundamental notions of administrative law and the role of the judiciary" (App. 108a, 123a).

Transit's Petition for Rehearing and Suggestion for Rehearing En Banc to the Court of Appeals was denied on September 24, 1973 (App. C).

REASONS FOR GRANTING THE WRIT

These cases do not arise in ordinary times. There is no longer any serious dispute that this country faces shortages in our energy supplies of major proportions. The questions that remain are *how much* economic dislocation these shortages will cause, *how drastic* will be the measures of adjustment, and *how long* will it take to increase our supplies.

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[11] The National Capital Area Transit Act of 1972, Pub. L. No. 92-517, 86 Stat. 999 (1972).

To meet these substantial shortages, it has been estimated that the investor-owned electric utility industry must, in the next ten years, invest $205 billion in new plant and equipment,[12] that the natural gas industry must lay nearly a million miles of new gas pipeline over the next 20 years,[13] and that, in order to reach only 90% self-sufficiency by 1985, the total capital requirements for energy facilities will range from $451 billion to $547 billion.[14] It is clear that the vast bulk of this capital must be raised from the private sector.

In the face of these unparalleled demands on our public utilities, the Court of Appeals' decisions in the instant cases will have, in the words of the American Gas Association, which is comprised of approximately 300 natural gas companies serving 140 million Americans and supplying 92% of the nation's natural gas, "significant adverse consequences for future public utility financing."[15] For what the court essentially has held is that the rates that regulated public utility companies charge their customers must be decreased—dollar for dollar—by the growth in value of their land when it is removed from operating status. At the very best this is, in effect, a requirement that public utilities sell off all their non-operating land to make

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[12] *ELECTRICAL WORLD*, Vol. 179, No. 12, June 15, 1973, at p. 30.

[13] *AMERICAN GAS ASSOCIATION MONTHLY*, Vol. 55, No. 2, February 1973, at p. 13.

[14] *NATION'S BUSINESS*, Vol. 61, No. 10, October 1973, at pp. 76-77.

[15] Brief in the Court of Appeals for the American Gas Association as Amicus Curiae in Support of Petition for Rehearing and Suggestion for Rehearing En Banc at 2, *Democratic Central Committee* v. *WMATC*, No. 21,865, *Bebchick* v. *WMATC*, No. 23,720, *Democratic Central Committee* v. *WMATC*, No. 24,398, *Black United Front* v. *WMATC*, No. 24,428 (1973).

up this deficiency in rate income. This far-reaching step has been taken, not by a legislature or a regulatory agency after thorough analysis of its potential consequences to the industry and to the public, but by a court, acting without a single precedent and in disregard of universally applied administrative judgments to the contrary.

What is perhaps even worse, the court has fashioned a sweeping principle of retroactivity—reaching back more than decade and brushing aside numerous final administrative and judicial decrees in applying its new rule. For the court has said that in fixing rate orders in 1968 and 1970, the Commission should have considered as current income, available as an offset to future rates, amounts that—according to its own view—were earned as early as 1958.

If these opinions are permitted to stand, potential utility investors and creditors will be compelled to assume not only the risk that the "rules of the game" at the time of their investment may not have continuing application in the *future*—a factor that is already inherent in regulated utility investments—but also the risk that the financial picture of the utility at the time of their investment is subject to complete recalculation some time in the unlimited future. Potential utility investors and creditors currently rely upon the financial state of the utility as reflected in the sworn statements of its officers to the Securities and Exchange Commission, the annual reports, and the financial statements certified by reputable accountants. If the principle of retroactivity applied by the Court of Appeals is permitted to stand, however, these financial statements are subject to recalculation at any time in the future when a principle upon which they have been

based is reversed retroactively. That new element of uncertainty injected by the court into utility investment will be immediately and directly reflected in higher costs for utility capital and credit. As the American Gas Association has warned, the court's opinion will "very significantly decrease the ability of the natural gas industry to raise needed capital."[16] And that is no less true for the other utility industries.

Thus, these cases have significance for the country far in excess of the impact upon the immediate parties. If the result is a further depletion in the incentive of investors to commit their funds for research and expansion in the vitally important energy utilities, the decisions below are of incalculable importance.

I. Growth in the Value of Land Is an Intrinsic Part of the Land Itself, and To Deprive Its Owners of that Growth Is To Deprive Them of Property Without Due Process and To Take It Without Just Compensation.

The Court of Appeals has held that, in prescribing rate orders for 1968 and 1970, the Commission should have reduced rates by the amount of growth in Transit's land, measured at the time it was transferred to non-operating status. Prescribing rates is a legislative act,[17] and although it is an exercise of the police power,[18] a taking of property cannot escape the obligations of the Just Compensation Clause simply

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[16] Motion in the Court of Appeals by the American Gas Association for Leave to File Statement of Amicus Curiae in Support of Petition for Rehearing and Suggestion for Rehearing En Banc at 3 (Nos. 21,865, 23,720, 24,398, and 24,428).

[17] *Bluefield Water Works & Improvement Co.* v. *Public Service Comm'n of West Virginia*, 262 U.S. 679 (1923).

[18] *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 601 (1944).

because it is accomplished under the guise of rate-making. [19]

It has been long established that investors in a public utility own the utility's property, including its property dedicated to public use. As this Court said in *Board of Comm'rs* v. *New York Tel. Co.*, 271 U.S. 23 (1926):

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company, just as does that purchased out of proceeds of its bonds and stock. * * * [*Id.* at 31-32.]

It is equally true that property can be "taken", in the constitutional sense, without divesting the owner of the title thereto; property in land is "taken" whenever one of the privileges or incidences of which it is composed is taken. [20]

Indeed, the Court of Appeals conceded that at one time the case law supported the proposition that "utility assets, though dedicated to the public service, remain exclusively the property of the utility's investors, and that growth in value is an inseparable and inviolate incident of that property interest" (App. 27a). However, the court went on to conclude that those cases which abandoned the requirement that rates

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[19] 2 *Nichols on Eminent Domain* § 6.1 (3d ed. 1970).

[20] *United States* v. *General Motors Corp.*, 232 U.S. 373 (1945); *United States* v. *Causby*, 328 U.S. 256 (1946).

be based upon the fair market value of a utility's assets also overturned the established doctrine that growth in the value of utility property is an intrinsic element of the property which cannot be taken without just compensation (App. 27a-38a).

A closer look at the history of those cases, however, does not support the court's conclusion. Certainly, *FPC* v. *Hope Natural Gas Co., supra,* did destroy the pre-existing notion that appreciation in the value of utility property is a part of the cost of service for which ratepayers must pay. No longer are ratepayers required to pay a return on that appreciation as part of their charge for service, nor must they reimburse investors for that appreciation in the form of depreciation charges. They are required only to pay a return on the capital originally invested in the assets and to reimburse investors only for the *cost* of depreciable assets. But it by no means follows from that, as the Court of Appeals contended, that the ratepayers are entitled to the capital gain itself or that the incidence of ownership in the land, always recognized as residing with the investors, has in any way been affected by *Hope Natural Gas* or its progeny.

As Potomac Electric Power Company stated in its *Amicus Curiae* Brief in Support of Transit's Petition for Rehearing in these cases:

> * * * Capital gains simply do not form part of the cost of service and that is the reason ratepayers need not pay for the use of assets based upon their value. Accordingly, since the capital gains have only to do with the fact of ownership, the utility is entitled to the benefit thereof.[21]

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[21] Brief in the Court of Appeals for Potomac Electric Power Co. as Amicus Curiae in Support of Petition for Rehearing and Suggestion for Rehearing En Banc at 6 (Nos. 21,865, 23,720, 24,398 and 24,428).

Growth in value is an essential element of the land itself, which belongs to the utility's investors and which cannot be taken without just compensation, even within the framework of ratemaking.

Moreover, to strip the investors of the capital gains on land in these circumstances is confiscatory. *Smyth* v. *Ames,* 169 U.S. 466 (1898), firmly established the principle that utility investors are entitled, as a matter of due process, to a reasonable opportunity to earn from ratepayers a reasonable return on their investment.[22] As discussed above, *Hope Natural Gas* altered that principle only to the extent of establishing that the original cost of the utility's assets may form the base against which a reasonable return is determined. It did not alter the fundamental constitutional principle of ratemaking that users must pay the cost of service. However, the Court of Appeals would overturn seventy-five years of constitutional law with the novel theory that ratepayers do not have to pay the cost of service to the extent that a utility's assets have grown in value. Indeed, under the court's view, ratepayers would avoid *any* charge for service where land values had increased sufficiently to offset their entire obligation to pay.

The Court of Appeals has remanded to the Commission with instructions to calculate the total in-service appreciation on the land that Transit sold or transferred to non-operating status, which amount *shall,* according to the court, represent the amount of restitution (App. 85a). The court has done so without regard to whether a rate originally calculated on that basis in

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[22] *See also Board of Comm'rs* v. *New York Tel. Co., supra,* 271 U.S. at 32; *Missouri ex rel. Southwestern Bell Tel. Co.* v. *Public Service Comm'n,* 262 U.S. 276, 289 *et seq.* (1923) (Brandeis Holmes, J.J., concurring).

1968 and 1970 would have been confiscatory. Indeed, in granting Transit its proposed increase in 1968, the Commission found that Transit's existing rates were so low as to be "unjust and unreasonable" because they would "not produce sufficient revenues to enable the carrier to meet its operating expenses and earn a reasonable return."[23] Now the court holds, in effect, that the Commission should have *decreased* the fares it set in response to that finding by an amount equal to the "paper gains" in land values, with no room for the Commission to determine whether rates set under these criteria would have permitted Transit even to meet its operating expenses, let alone provide a reasonable return for investors. The Due Process Clause guarantees a utility the right to rates that will not compel it to operate at a loss;[24] indeed, a utility is entitled to the opportunity to earn sufficient profit to attract investors.[25] The court's opinion deprives utilities of that opportunity.

Finally, the court's opinion denies Transit due process because it would permit past profits to sustain confiscatory rates for the future, a proposition that, until now, has been soundly rejected as a violation of due process guarantees.[26]

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[23] *D. C. Transit System, Inc., supra,* 72 P.U.R.3d at 159.

[24] Nichols, *Ruling Principles of Utility Regulation: Rate of Return* 22-25 (1955).

[25] *Id.* at 27-30.

[26] *Newton* v. *Consolidated Gas Co. of New York,* 258 U.S. 165, 175 (1922); *Board of Comm'rs* v. *New York Tel. Co., supra,* 271 U.S. at 31; *Los Angeles Gas & Electric Corp.* v. *Railroad Comm'n of California,* 289 U.S. 287, 313 (1933); *Pacific Tel. & Tel. Co.* v. *California Public Utility Comm'n,* 62 Cal.2d 634, 401 P.2d 353, 44 Cal. Rptr. 1 (1965); 1 Priest, *Principles of Public Utility Regulation* 75 (1969).

In the court's own view, Transit "earned" income at the time it transferred land to non-operating status. The amount of that income was the appreciation over cost at the time of the transfer. Some of these transfers occurred as early as 1958 (App. 90a-93a). Most, if not all, occurred prior to both rate orders under review. Yet the court has now said that in setting Transit's future rates in 1968 and again in 1970, the Commission should have credited as an offset to such future rates this income that Transit "earned" in prior years. The court's prescription consists of using past profits to support future rates, and yet there are no means provided, under the court's narrow remand instructions and its own view of the case, to determine whether such past profits are sustaining what otherwise would be confiscatory rates. To permit this holding to stand would be to emasculate due process protections to which regulated utilities have been historically and necessarily entitled.

II. By Retroactively Reversing Firmly Settled Law on the Proper Treatment of Land Appreciation, the Court Has Denied Transit the Procedural Guarantees of the Due Process Clause.

Retroactive changes in settled law can result in the kind of gross unfairness that violates procedural due process guaranteed by the Fifth Amendment.[27] This

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[27] *United States* v. *Macdaniel*, 32 U.S. (7 Pet.) 1, 14, 15 (1833); *Gelpcke* v. *City of Dubuque*, 68 U.S. (1 Wall.) 519 (1864); *Douglass* v. *County of Pike*, 101 U.S. 968 (1880); *Green County* v. *Conness*, 109 U.S. 104 (1883); *Edward Hines Yellow Pine Trustees* v. *Martin*, 268 U.S. 458 (1925). Stimpson, *Retroactive Application of Law—A Problem of Constitutional Law*, 38 MICH. L.R. 30 (1938); 1 Davis, *Administrative Law Treatise* §§ 5.08-5.09. The above authorities deal primarily with retroactivity in judicial

is particularly true where the party asserting the denial has changed his position in reliance upon the existing law. The principle that capital gains on a utility's land belong to the investors has been firmly established not only in the regulation of Transit, but as a principle universally applied in the utility industry.

The Commission's predecessor, the PUC, first promulgated a regulation on the proper treatment of land appreciation in 1946.[28] That regulation stated that when land is transferred "below the line," no income is realized. The property merely is transferred, at book value, to a non-operating property account on the company's books. When land is sold, any gain is profit, *i.e.*, a credit to earned surplus.

The "rules, regulations, orders" and "decisions" of the PUC survived the Commission's succession unless and until changed.[29] The PUC and the Commission have consistently applied this regulation to Transit. The PUC first explicitly faced the issue of allocating

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decision-making. In addition, the more numerous cases and authorities dealing with retroactive application of legislative enactments are also apposite since ratemaking is a legislative act (*see* n. 17, *supra*. *See, e.g.*, Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L.R. 692 (1960).

[28] *Capital Transit Co.* (Order No. 3087) (PUC Sept. 23, 1946) (unreported). That rule was specifically discussed by the Commission in *D. C. Transit System, Inc.* (Order No. 981), 81 P.U.C.3d 113, 126-127 (WMATC 1969). The court's contention that there apparently was no operative accounting rule on the issue (App. 66a) is, as Judge MacKinnon pointed out in his dissent (App. 123a), "selective blindness."

[29] Compact, *supra*, at tit. II, art. XII, § 21.

capital gains on land between investors and farepayers in a 1959 rate proceeding.[30] It stated:

> * * * The staff and the company are in agreement that under public utility accounting, the difference between the original cost of the land and the selling price is recognized as profit. The net profit * * * on the sale of the land * * * is, therefore, a proper credit to earned surplus. [*Id.* at 409.]

This aspect of the PUC's holding was not appealed.

The issue was again raised, before the Commission, in 1963.[31] The Commission stated that:

> * * * While the ratepayers may have a claim to depreciable property, at least to the extent of the depreciation reserves, no such claim can be directed to land. [*Id.* at 399.]

Again, this aspect of the Commission's determination was not appealed.

The three authorities to the contrary cited by the panel majority in the instant cases do not, as Judge MacKinnon pointed out in dissent (App. 100a), support its conclusion. Two of them stand for the proposition that the benefit of capital gain accompanies the risk of capital loss.[32] Therefore, where a utility commission's accounting procedures provide that rate-

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[30] *D. C. Transit System, Inc.* (Order No. 4577), 30 P.U.R.3d 405 (PUC 1959).

[31] *D. C. Transit System, Inc.* (Order No. 245), 48 P.U.R.3d 385 (WMATC 1963).

[32] *New York Water Service Corp.*, 7 P.U.R.3d 32 (N.Y. Public Service Comm'n 1955), *aff'd, New York Water Service Corp.* v. *Public Service Comm'n*, 12 App. Div.2d 122, 208 N.Y.S.2d 857 (1960); *Columbia Gas Co.* v. *Public Utility Comm'n*, 292 U.S. 398, 410-411 (1934) (distinguished by Judge MacKinnon, App. 103a, 104a n.25).

payers must bear any losses on land—a practice manifestly not employed by the Commission here—the utility commission is not acting unreasonably in crediting gains on land to the ratepayers. The third has been overruled on the precise issue here involved.[33] That is the extent of the court's precedents. There are no more. As Judge MacKinnon pointed out, the dearth of decided cases is "more indicative of the fact that no one previously has ever imagined of or argued for such a novel approach with respect to non-depreciable properties" (App. 100a).

The position consistently taken by the Commission is in all relevant respects the same as that authorized by the Uniform Systems of Accounts used by the District of Columbia Public Service Commission for District gas and electric utilities;[34] by the Federal Power Commission for gas and electric companies;[35] by the Interstate Commerce Commission for railroads, electric railways, and passenger motor carriers;[36] and it is the same as that recommended by the National Association of Regulatory Utility Commissioners for state commissions that regulate gas, water and electric utilities.[37]

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[33] *City of Lexington* v. *Lexington Water Co.*, 458 S.W.2d 778 (Ky. Ct. App. 1970), *rev'g, Lexington Water Co.*, 72 P.U.R.3d 253 (Ky. Public Service Comm'n 1968).

[34] The PSC employs the Uniform System of Accounts for Natural Gas Companies prescribed by the FPC. (*See* n.35, *infra*. *See e.g.*, Order No. 5455 (PSC Jan. 29, 1971) (unreported).

[35] Uniform System of Accounts Prescribed for Natural Gas Companies, F.P.C. Transmittal Sheet No. 1, July 29, 1970.

[36] 49 C.F.R. §§ 1201.2-8(c), 1202.06-7, 1206.2-21(d).

[37] See the following publications by the National Association of Regulatory Utility Commissioners: *Uniform System of Accounts for Class A and B Gas Utilities* (1972); *Uniform System of Ac-*

In formulating its financial planning, the Company relied upon these consistently applied and generally accepted accounting principles that were applicable at the time of the transfers. It made decisions about whether or not to transfer the properties here involved—and thereby assume the cost of their maintenance and taxes—based upon the settled accounting principles in effect at that time. It decided whether to retain these properties or sell them, whether to leave them vacant or rent them, and the extent to which debts should be incurred upon them as security, all based upon a set of established principles in effect at that time. It made decisions about its ability to expand operations and operating expenses—for example, in wage negotiations with its unions—based upon the fact that its earned surplus included gains on land it already had sold and would include gains on land it could sell. And investors and creditors made decisions based upon the same assumptions. Transit, its parent, its parent's more than 7,000 shareholders, and Transit's creditors were all entitled to rely upon these principles which had been approved by numerous final rate orders of the Commission and had never been questioned by the Court of Appeals.

Although the court referred to the allegedly "unique" circumstances of this case (App. 2a), nothing in its opinion identified any reason to distinguish this situation from those faced by other regulated utilities. To the contrary, as has been noted, the accounting practices overturned by the court are applied to all

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counts for Class A and B Water Utilities (1957); *Uniform System of Accounts for Class C Water Utilities* (1972); *Uniform System of Accounts for Class D Water Utilities* (1957); *Uniform System of Accounts for Class A and B Electric Utilities* (1972); *Uniform System of Accounts for Class C and D Electric Utilities* (1973).

utilities in the District of Columbia and employed by the federal agencies which have regulatory authority for public utilities throughout the nation. Those agencies also fall within the jurisdiction of the Court of Appeals for the District of Columbia Circuit. And in striking the equity balance between investors and consumers, the panel majority, as Judge MacKinnon pointed out (App. 121a), considered a number of factors which are equally applicable to all utilities.

The uncertainty resulting from the decision below directly and immediately translates into higher costs for credit and greater difficulty in attracting investors for all regulated utilities. As the American Gas Association stated in its Amicus Curiae brief in support of the Petition for Rehearing in these cases:

> * * * A rule which leaves matters of utility regulation to *ex post facto* determination on a case-by-case basis will have exactly the same effect on utility financing and capital structure as the most adverse decision which could be made in any case. Investors looking to the acquisition of utility common stock, whether of existing issues or in new financings, would realistically have to assume the most adverse decision before making an investment * * *.[38]

The Court of Appeals has rendered a constitutionally unsound decision at a distinctly unpropitious moment. Although it is obviously impossible to project its impact with certainty, it is clear that it could deal a critical blow to this nation's capacity to respond to a pressing energy crisis.

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[38] *Amicus curiae* brief for the American Gas Association, *supra*, at 2.

III. By Discarding Established Commission Practices Which Were Eminently Reasonable, the Court Has Exceeded Its Proper Scope of Review.

This Court has repeatedly stated that, when administrative accounting practices are being reviewed, the role of a court is severely limited. The "basic principle" of such judicial review was stated by this Court in *American Tel. & Tel. Co.* v. *United States,* 299 U.S. 232 (1936). In reviewing an order of the Federal Communications Commission prescribing its Uniform System of Accounts, the Court said:

> This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be "so entirely at odds with fundamental principles of correct accounting" (*Kansas City Southern Ry. Co.* v. *United States,* 231 U.S. 423, 444 [1913]) as to be the expression of a whim rather than an exercise of judgment. * * * [*Id.* at 236-237].[39]

Although the majority in the instant cases gave lip service to a "rational basis" standard of review, in fact, as other language in the majority and dissenting opinions clearly shows, the majority merely substituted its own judgment of the preferable account-

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[39] *See also Kansas City Southern Ry. Co.* v. *United States, supra; Dobson* v. *Comm'r,* 320 U.S. 489, 502 (1943); *Mississippi Valley Barge Line Co.* v. *United States,* 292 U.S. 282, 286-287 (1934).

ing procedures and of the equities for that of the Commission.[40]

The Commission, like its predecessor, the PUC, is charged with broad authority and discretion in prescribing "rules and regulations" controlling the accounting procedures of utilities under its jurisdiction.[41] That the Commission's rule on land appreciation, discussed above, is "reasonable" is abundantly clear. As has been pointed out, it can hardly be "entirely at odds with fundamental principles of correct accounting" since it is the identical rule that is applied by virtually every, if not in fact all, utility regulatory agencies in the country.[42] Conversely, the opposite rule adopted by the court is, as has also been pointed out, wholly unprecedented.

Indeed, the Commission's consistently applied accounting practice is eminently "reasonable" even when measured against the court's own rationale for overturning it. Perceiving no constitutional compulsion to leave growth to the owners of property, the court proceeded to weigh the equities. In so doing, it articulated two controlling "doctrinal considerations": (a) that he who bore the *risk of capital loss* should be entitled to any capital gains, and (b) that he who bore the *financial burden* of this property should also reap the benefits therefrom (App. 39a-50a).

As Judge MacKinnon pointed out (App. 97a-99a), the panel majority confused the effect of these princi-

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[40] For example, the majority concluded that the Commission "erred" (App. 2a, was "in error" (App. 6a), was "erroneous" (App. 82a), and that, in the court's view of the equities, the scales were "tipped" in favor of the ratepayers (App. 72a). *See also* the dissent at App. 96a.

[41] Compact, *supra* at tit. II, Art. XII, §§ 6, 10, 15.

[42] See pp. 18-19, *supra*.

ples on *non-depreciable* land with their effect on *depreciable* property. Thus, while it is true that farepayers must bear the *risk of loss* on depreciable property,[43] the Commission has made it clear that *investors* bear the risk of loss on land.[44] And although farepayers do carry the *financial burden* of depreciable property, to the extent that depreciation is an expense reimbursed by fares, land is not depreciable.[45] The investors bear the cost. They are not reimbursed. Accordingly, the court's own determinative principles would indicate that the investors should be entitled to the gain.

The court grossly overstepped its legitimate range of review in striking down a reasonable Commission rule, proceeding to determine for itself the relevant equities, and actually balancing those equities in the particular situation at hand, all without regard to the Commission.

CONCLUSION

For the reasons stated above, we respectfully pray that the Court grant the writ and reverse the opinions and judgments of the Court of Appeals in the instant cases.

Respectfully submitted,

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[43] For example, if a depreciable asset becomes suddenly obsolescent and is retired, farepayers are obligated to make up for the under-depreciation by charges to the depreciation reserve.

[44] *D.C. Transit System, Inc., supra*, 48 P.U.R.3d. at 400.

[45] *Id.* at 399-400.